

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD J. HERBST, Sr.

Defendant.

No. 10-CR-1008-LRR

FINAL JURY INSTRUCTIONS

Ladies and Gentlemen of the Jury:

The instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 1

In considering these instructions, attach no importance or significance whatsoever to the order in which they are given.

INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action or remark that I have made during this trial have I intended to give any opinion or suggestion as to what the facts are or what your verdicts should be.

INSTRUCTION NO. 3

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you just verdicts, unaffected by anything except the evidence, your common sense and the law as I give it to you.

INSTRUCTION NO. 4

I have mentioned the word “evidence.” The “evidence” in this case consists of the following: the testimony of the witnesses, including the defendant, documents and other things received as exhibits and facts that have been stipulated—that is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by the lawyers are not evidence.
2. Anything that might have been said by jurors, the attorneys or the judge during the jury selection process is not evidence.
3. Objections are not evidence. The parties have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
4. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.
5. Anything you saw or heard about this case outside the courtroom is not evidence.

If you were instructed that some evidence was received for a limited purpose only, you must follow that instruction. During the trial, documents were referred to but they were not admitted into evidence and, therefore, they will not be available to you in the jury room during deliberations.

INSTRUCTION NO. 5

The government and the defendant have stipulated—that is, they have agreed—that certain facts are as counsel have stated. You must therefore treat those facts as having been proved.

INSTRUCTION NO. 6

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witness to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 7

The jurors are the sole judges of the weight and credibility of the testimony and the value to be given to the testimony of each witness who has testified in this case. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

You should judge the testimony of the defendant in the same manner as you judge the testimony of any other witness.

INSTRUCTION NO. 8

In a previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you are to consider the testimony of certain witnesses.

A witness may be discredited or impeached by contradictory evidence; by showing that the witness testified falsely concerning a material matter; by showing the witness has a motive to be untruthful; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony.

You have heard testimony from James Patterson and Patricia Patterson who stated that they participated in the crimes charged against the defendant. Their testimony was received in evidence and may be considered by you. You may give their testimony such weight as you think it deserves. Whether or not their testimony may have been influenced by their desires to please the government or to strike a good bargain with the government about their own situations is for you to determine.

INSTRUCTION NO. 9

Exhibits have been admitted into evidence and are to be considered along with all of the other evidence to assist you in reaching your verdicts. You are not to tamper with the exhibits or their contents, and each exhibit should be returned into open court, along with your verdicts, in the same condition as it was received by you.

INSTRUCTION NO. 10

You have heard audio recordings of conversations. These conversations were legally recorded, and you may consider the recordings just like any other evidence.

As you have also heard, there is a typewritten transcript of the audio recording I just mentioned. That transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the audio recording, and also to help you keep track of the speakers. Differences in meaning between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice. It is what you hear, however, and not what you read, that is the evidence.

You are specifically instructed that whether the transcripts correctly or incorrectly reflect the conversations or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcripts, and upon your own examination of the transcripts in relation to what you hear on the audio recording. If you decide that any of the transcripts are in any respect incorrect or unreliable, you should disregard them to that extent.

INSTRUCTION NO. 11

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

INSTRUCTION NO. 12

The Indictment in this case charges the defendant with eleven different crimes. In Count 1, the Indictment charges that the defendant committed the crime of conspiracy to buy, receive or possess goods (processed meat products) stolen from interstate shipments of freight or other property.

In each of Counts 2-11, the Indictment charges that the defendant committed the crime of buying, receiving or possessing goods (processed meat products) that were part of an interstate shipment of freight or other property knowing the goods had been stolen. The defendant has pleaded not guilty to each charge.

As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. To the contrary, the defendant is presumed to be innocent. Thus the defendant, even though charged, begins the trial with no evidence against him. The presumption of innocence alone is sufficient to find the defendant not guilty and can be overcome only if the government proves, beyond a reasonable doubt, each element of the crime charged.

Keep in mind that each count charges a separate crime. You must consider each count separately and return a separate verdict for each count.

There is no burden upon a defendant to prove that he is innocent.

INSTRUCTION NO. 13

The crime of conspiracy as charged in Count 1 of the Indictment has four elements, which are:

One, between about the Fall of 2006 and the end of September 2007, two or more persons reached an agreement or came to an understanding to buy, receive or possess goods (processed meat products) that were part of an interstate shipment of freight or other property;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect;

Three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and

Four, while the agreement or understanding was in effect, a person or persons who had joined in the agreement knowingly did one or more of the following acts for the purpose of carrying out or carrying forward the agreement or understanding:

1. Between at least September 2006 and the end of September 2007, one or more employee(s) of McFarland Trucking Company would, on a regular basis, take possession of one or more semi-trailer(s) loaded with processed meat products and other goods at the Americold storage facility in East Dubuque, Illinois.

2. Semi-trailers that had been loaded with processed meat products and picked up in East Dubuque, Illinois, were often driven to property located at 10864 Mandersheid Road in Zwingle, Iowa, ("Mandersheid Road property"), before the assigned deliveries were made.

(CONTINUED)

INSTRUCTION NO. 13 (Cont'd)

3. Semi-trailers taken to the Mandersheid Road property would be opened and entered there, after the security seal that had been placed on the trailers at the Americold facility was broken.

4. Processed meat products, in varying quantities and type, were stolen from the trailers taken to the Mandersheid Road property, including at least on about the dates, and in amounts having a value at least as great, as specified below, with each such theft constituting a separate overt act:

<u>Approximate Date</u>	<u>Value of Product</u>
September 6, 2006	\$ 1,577
October 15, 2006	\$ 4,598
October 22, 2006	\$ 7,179
November 19, 2006	\$ 5,963
November 26, 2006	\$ 2,242
December 9, 2006	\$ 4,401
December 10, 2006	\$ 5,096
December 16, 2006	\$ 1,573
December 29, 2006	\$ 3,200
February 7, 2007	\$ 2,987
February 11, 2007	\$ 5,195
February 17, 2007	\$ 4,995
March 25, 2007	\$ 1,766
April 11, 2007	\$ 3,857
April 15, 2007	\$ 3,918
April 21, 2007	\$ 2,150
April 28, 2007	\$ 7,033
May 12, 2007	\$ 3,273
May 26, 2007	\$ 5,222
June 2, 2007	\$ 12,219
June 16, 2007	\$ 9,440
July 7, 2007	\$ 4,321

(CONTINUED)

INSTRUCTION NO. 13 (Cont'd)

July 18, 2007	\$ 9,572
July 21, 2007	\$ 17,321
July 28, 2007	\$ 7,685
August 4, 2007	\$ 5,272
August 25, 2007	\$ 13,088
September 7, 2007	\$ 6,339
September 8, 2007	\$ 5,208

5. Processed meat products removed from loaded semi-trailers at the Mandersheid Road property were sometimes temporarily stored in a refrigerated trailer located on that property.

6. Most of the processed meat products removed from loaded semi-trailers at the Mandersheid Road property were eventually sold to the defendant and others in and around Dubuque, Iowa.

7. The conspirators communicated or attempted to communicate by phone on at least the following dates for which records are available, for the purpose of facilitating the sale or purchase of stolen processed meat products, with each call constituting a separate overt act:

Date
09/05/06
11/17/06
11/19/06
12/10/06
02/11/07
02/18/07

(CONTINUED)

INSTRUCTION NO. 13 (Cont'd)

04/13/07
04/14/07
04/15/07
04/19/07
04/22/07
04/23/07
05/13/07
05/28/07
05/30/07
06/03/07
06/04/07
06/17/07
06/18/07
07/18/07
07/22/07
07/23/07
07/24/07
07/25/07
07/29/07
07/30/07
08/05/07
08/18/07
08/19/07
08/20/07
08/26/07
09/09/07
09/24/07
09/30/07

8. The defendant took delivery of processed meat products inside the garage at his residence located on Kaufmann Avenue in Dubuque, Iowa, and at the defendant's business, Dubuque Hose and Hydraulic Company, on East 14th Street in Dubuque, Iowa.

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INSTRUCTION NO. 13 (Cont'd)

9. The defendant paid cash, often in \$100 denominations, for the processed meat products he bought.

10. The defendant resold most of the processed meat products he purchased to friends and acquaintances in the Dubuque area.

11. On September 9, 2007, the defendant took delivery of a large quantity of stolen processed meat products at his home on Kaufmann Avenue in Dubuque, Iowa.

12. On one occasion in 2007, the defendant told a friend of the defendant's to come to his business on a Monday morning to purchase meat.

13. When the defendant's friend, referenced in the preceding paragraph, went to the defendant's business to purchase two cases of bacon, the defendant offered to sell his friend more meat.

14. When the defendant's friend declined the invitation to buy more meat than the two cases of bacon he came to purchase, the defendant commented, "well, at least they're stealing the good stuff."

15. On September 30, 2007, the defendant met Jim Patterson at the defendant's business, Dubuque Hose and Hydraulic Company, in Dubuque, Iowa, for the purpose of transacting a purchase of processed meat products from Patterson.

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INSTRUCTION NO. 13 (Cont'd)

16. On September 30, 2007, the defendant bought 25 cases of bacon-wrapped filets from Patterson.

17. On September 30, 2007, the defendant paid Patterson \$ 201 for the bacon-wrapped filets.

18. On September 30, 2007, the defendant assured Patterson that the defendant, "was pretty careful," who he sells the meat to because he didn't want to get, "in trouble."

19. Each of Counts 2 - 11 are incorporated herein by this reference and alleged as separate overt acts.

If each of these four elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged in Count 1.

INSTRUCTION NO. 14

In considering whether the government has met its burden of proving the offense of conspiracy as alleged in Count 1 of the Indictment, you are further instructed as follows:

The government must prove that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether that person is a defendant or named in the Indictment.

The “agreement or understanding” need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event, or merely acting in the same way as others or merely associating with others, does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one, does not thereby become a member.

But a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

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INSTRUCTION NO. 14 (Cont'd)

You must decide, after considering all of the evidence, whether the conspiracy alleged in the Indictment existed. If you find that the alleged conspiracy did exist, you must also decide whether the defendant voluntarily and intentionally joined the conspiracy, either at the time it was first formed or at some later time while it was still in effect. In making that decision, you must consider only evidence of the defendant's own actions and statements. You may not consider actions and pretrial statements of others, except to the extent that pretrial statements of others describe something that had been said or done by the defendant.

INSTRUCTION NO. 15

To assist you in determining whether there was an agreement or understanding to buy, receive or possess goods (processed meat products) stolen from an interstate shipment of freight or other property, as alleged in Count 1, you are advised that the elements of the offense of buying, receiving or possessing goods stolen from an interstate shipment of freight or other property, are:

One, buying, receiving or possessing goods;

Two, the goods were part of an interstate shipment; and

Three, the defendant had knowledge that the goods had been stolen.

Keep in mind that Count 1 of the Indictment charges a conspiracy to buy, receive or possess stolen goods, and not that stolen goods were actually bought, received or possessed.

INSTRUCTION NO. 16

It is not necessary that the act done in furtherance of the conspiracy be in itself unlawful. It may be perfectly innocent in itself.

It is not necessary that the defendant have personally committed the act, known about it, or witnessed it. It makes no difference which of the conspirators did the act. This is because a conspiracy is a kind of "partnership" so that under the law each member is an agent or partner of every other member and each member is bound by or responsible for the acts of every other member done to further their scheme.

It is not necessary that the government prove, beyond a reasonable doubt, that more than one act was done in furtherance of the conspiracy. It is sufficient if the government proves, beyond a reasonable doubt, *one* such act; but in that event, in order to return a verdict of guilty, you must unanimously agree upon which act was done.

INSTRUCTION NO. 17

It is not necessary for the government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

INSTRUCTION NO. 18

If you have found beyond a reasonable doubt that a conspiracy existed and that the defendant was one of its members, then you may consider acts knowingly done and statements knowingly made by the defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant even though they were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant had joined the conspiracy, for a person who knowingly, voluntarily and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the beginning of the conspiracy.

INSTRUCTION NO. 19

The crime of buying, receiving or possessing goods stolen from an interstate shipment, as charged in Counts 2-11 of the Indictment has three elements, which are:

One, goods (processed meat products) were stolen from semi-trailers owned by McFarland Trucking which were part of an interstate shipment of freight or other property;

Two, the defendant bought, received or possessed those goods on or about the following dates:

Count 2: May 27, 2007
Count 3: June 3, 2007
Count 4: June 17, 2007
Count 5: July 8, 2007
Count 6: July 22, 2007
Count 7: July 29, 2007
Count 8: August 5, 2007
Count 9: August 19, 2007
Count 10: August 26, 2007
Count 11: September 9, 2007; and

Three, at the time that the defendant bought, received or possessed those goods, he knew the goods had been stolen.

Property has been “stolen” if it has been taken with the intent to permanently or temporarily deprive the owner of the rights and benefits of ownership.

A shipment becomes an interstate shipment as soon as it is assembled for movement across a state line and remains one until it arrives at its final destination and is delivered.

If each of these three elements have been proved beyond a reasonable doubt, then you must find the defendant guilty of the count under consideration by you; otherwise you must find the defendant not guilty of the count under consideration by you.

INSTRUCTION NO. 20

The government is not required to prove that the defendant knew that his acts or omissions were unlawful. An act is done “knowingly” if the defendant is aware of the act and does not act through ignorance, mistake or accident. You may consider evidence of the defendant’s words, acts or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

INSTRUCTION NO. 21

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that the processed meat he bought, received or possessed was stolen and that he deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant deliberately closed his eyes to what would otherwise have been obvious to him.

You may not find that the defendant acted knowingly if you find he was merely negligent, careless or mistaken as to the fact that the processed meat he bought, received or possessed was stolen. You may not find that the defendant acted knowingly if you find that the defendant actually believed that the processed meat he bought, possessed or received was not stolen.

INSTRUCTION NO. 22

You have heard evidence that the defendant was involved in civil cases related to this case and that settlements were reached in each of them. You are instructed that these settlements are not proof that the defendant committed any of the crimes alleged in the Indictment. The burden of proof in any civil action is by a preponderance of the evidence, which is a much lesser burden of proof than in a criminal case, which is beyond a reasonable doubt.

You are instructed that you may give the evidence regarding settlement such weight as you decide it deserves in relation to this case.

INSTRUCTION NO. 23

You will note that the Indictment charges that the offenses were committed “on or about” a certain date. The government need not prove with certainty the exact date or the exact time period of the offense charged. It is sufficient if the evidence establishes that the offense occurred within a reasonable time of the date or period of time alleged in the Indictment.

INSTRUCTION NO. 24

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 25

In conducting your deliberations and returning your verdicts, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because your verdicts—whether guilty or not guilty—must be unanimous.

Each of you must make your own conscientious decisions, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

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INSTRUCTION NO. 25 (Cont'd)

Fifth, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdicts might be—that is entirely for you to decide.

INSTRUCTION NO. 26

Attached to these instructions you will find eleven Verdict Forms. The Verdict Forms are simply the written notices of the decisions that you reach in this case. The answers to the Verdict Forms must be the unanimous decisions of the jury.

You will take the Verdict Forms to the jury room, and when you have completed your deliberations and each of you has agreed to the answers to the Verdict Forms, your foreperson will fill out the Verdict Forms, sign and date them and advise the Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return the Verdict Forms in accord with the evidence and these instructions.

October 1, 2010

Date

Linda R. Reade

Linda R. Reade, Chief Judge

United States District Court

Northern District of Iowa